

² K.S.A. 44-520.

The claimant requests the May 20, 2010 preliminary hearing Order be affirmed, arguing that the ALJ found claimant's testimony credible and correctly found claimant sustained a compensable injury and gave timely notice.

The issues are:

- Whether claimant sustained an accidental injury arising out of and in the course of her employment with the respondent.
- Whether claimant provided timely notice.
- Whether the ALJ exceeded his jurisdiction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

The claimant worked for the respondent as a membership representative. Her job duties included teller work and other miscellaneous duties as assigned. The claimant testified that on December 5, 2008, while walking out of the vault she fell over a step stool and tripped into the gate door. She fell down and hit her head, hurt her knee and twisted her back.³ Conservative treatment was provided and claimant testified she was released with restrictions on January 10, 2009.⁴

Claimant testified she continued to experience back pain and some numbness in her back.⁵ She also testified she occasionally discussed her low back problems with her supervisor.⁶ Claimant testified that on February 26, 2010, she injured her back again when she was putting away a cash drawer.⁷ February 26, 2010, was the last day claimant worked for the respondent. Claimant was subsequently terminated for attendance issues.

³ P.H. Trans. at 8.

⁴ *Id.* A January 3, 2009 return-to-work note in Claimant's Exhibit 1 to the preliminary hearing transcript indicates that claimant was released without restrictions on January 10, 2009, as it appears the January 3, 2009 note restricted claimant from lifting over 5 pounds until January 10, 2009.

⁵ P.H. Trans. at 9.

⁶ *Id.*

⁷ *Id.*, at 9, 10.

The record indicates claimant's letter of termination was sent via certified mail and signed for on or about March 22, 2010.⁸

Claimant's Exhibit 5 to the preliminary hearing transcript includes a chronology prepared by respondent of contacts or lack thereof beginning March 1, 2010, leading to claimant's termination. Claimant testified she called respondent several times to report health-related issues and that she was not able to come to work. Each time she called she left a message and did not talk to any employee of the respondent.⁹ None of the messages left by the claimant reported that she had a back injury related to work. The March 5, 2010 message left did indicate claimant had problems with her back.¹⁰

The claimant presented at the Via Christi Regional Medical Center, St. Joseph Campus, emergency room complaining of abdominal and back pain, sick abdominal pain and an indication of bilateral flank pain on March 3, 2010.¹¹ The hospital performed a CT scan of claimant's abdomen and a gallbladder sonogram. The hospital released claimant and recommended she see her primary care physician, Dr. Antonio Osio.

Before seeing Dr. Osio on March 4, 2010, for a follow-up appointment after her March 3 visit to the emergency room, medical records indicate claimant saw Dr. Osio on February 25, 2010, with various complaints and that she was assessed with constipation and irritable bowel syndrome.

The record indicates that when claimant saw Dr. Osio on March 4, 2010, for the emergency room follow-up appointment, claimant reported complaints of lower lumbar pain with radiculopathy down her legs, her back started hurting on February 28, 2010, and she had a previous back injury.¹² With regard to the problem she was having with her stomach, claimant testified Dr. Osio told her she had a virus. With regard to claimant's back, the record indicates a CT scan of claimant's lumbosacral spine revealed a bulge at L4-L5 and that an MRI was ordered. Dr. Osio referred claimant to Dr. Matthew N. Henry for her back and leg conditions.

In a letter to Dr. Osio regarding the claimant, Dr. Henry wrote in part:

⁸ *Id.*, at 33, 34 and Cl. Ex. 5.

⁹ *Id.*, at 25.

¹⁰ *Id.*, at 14.

¹¹ *Id.*, at 11, 12 and Resp. Ex. 1.

¹² *Id.*, Resp. Ex. 1.

The MRI of the lumbar spine revealed severe degenerative disc disease at L4-L5 and L5-S1 with annular tears at these levels. Her back pain is so severe that she is unable to work and bothers her all the time. She has failed many forms of conservative therapy.

At this point in time, since she has had such bad low back pain, I have offered her an L4-L5 and L5-S1 anterior lumbar interbody fusion. . . .¹³

Claimant e-mailed the respondent on March 24, 2010, informing them that she had reinjured her back on February 26 when lifting a cash drawer.¹⁴

This is an appeal from a preliminary hearing. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction.¹⁵ In addition K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation. The ALJ has not exceeded his jurisdiction in this regard.

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.¹⁶ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁷

Based on the record compiled to date, this Board Member concludes the claimant has met her burden of proof in showing that she has sustained an accidental injury on February 26, 2010, arising out of and in the course of her employment with the respondent. Claimant's testimony regarding the February 26, 2010 accident is uncontroverted. In addition, claimant reported back pain to the emergency room personnel on March 3 and to Dr. Osio on March 4 and the MRI of the lumbar spine revealed severe degenerative disc disease at L4-L5 and L5-S1 with annular tears at those levels.

¹³ *Id.*, Cl. Ex. 1 (Dr. Henry's March 24, 2010 letter to Dr. Osio).

¹⁴ *Id.*, Cl. Ex. 5.

¹⁵ K.S.A. 2009 Supp. 44-551(i)(2)(A).

¹⁶ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

¹⁷ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of the accident if claimant's failure to notify respondent under the statute was due to just cause. The ALJ concluded that claimant's failure to notify respondent under the statute was due to multiple medical problems which he deemed just cause.

Shortly after the work-related accident, claimant suffered abdominal pain severe enough to cause her to seek treatment in the emergency room which then resulted in a visit to her primary care physician. It is logical that claimant could have been distracted by the virus, which caused her to fail to notify the respondent within 10 days after the accident. Further, the onset of the virus was an event that claimant could not control nor predict. At this juncture in the proceeding this Board Member agrees with the ALJ that claimant had just cause for her failure to notify the respondent within 10 days. Claimant's notice of March 24, 2010, however, is within 75 days from the date of the accident and due to claimant's just cause her claim is not barred by K.S.A. 44-520.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated May 20, 2010, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Daniel S. Bell, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

¹⁸ K.S.A. 44-534a.